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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARIA A., Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY and EMILIANO L., Appellees.	2 CA-JV 2009-0104 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. J-14262300

Honorable Kathleen A. Quigley, Judge Pro Tempore

AFFIRMED

Sarah Michèle Martin — Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Claudia Acosta Collings — Tucson
Attorneys for Appellee
Arizona Department of Economic Security

H O W A R D, Chief Judge.

¶1 Appellant Maria A. is the mother of six children, the youngest of whom is Emiliano L., born in February 2002.[1] On September 10, 2009, the juvenile court terminated Maria's parental rights to Emiliano on grounds of abandonment, abuse or neglect, mental illness or chronic substance abuse, and Maria's inability to remedy the circumstances causing Emiliano to remain in a court-ordered, out-of-home placement for longer than fifteen months. *See* A.R.S. § 8-533(B)(1), (B)(2), (B)(3), and (B)(8)(c). On appeal, Maria contends the court erred in finding the existence of all four statutory grounds for severance and in finding that terminating her parental rights was in Emiliano's best interests.

¶2 Before it may terminate a parent's rights, a juvenile court must find by clear and convincing evidence that at least one statutory ground for severance exists and must find by a preponderance of the evidence that terminating the parent's rights is in the best interests of the child. *See* A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). We will affirm an order terminating parental rights unless we must say as a matter of law that, based on the evidence presented, no reasonable person could have found those essential elements proven by the applicable evidentiary standard. *Denise R. v. Ariz. Dep't of Econ. Sec.*, 221 Ariz. 92, ¶ 9, 210 P.3d 1263, 1265-66 (App. 2009). We view the evidence in the light most favorable to

[1]Maria does not have custody of any of her other five children. According to the initial case report prepared after Emiliano was taken into custody in April 2007, her three oldest children are in the sole custody of their father, and Maria's parental rights to her fourth and fifth children were severed in February 2003.

upholding the court's order. *Manuel M. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 205, ¶ 2, 181 P.3d 1126, 1128 (App. 2008).

¶3 Five-year-old Emiliano was taken into protective custody in April 2007 after Maria had left him overnight with an acquaintance and then failed to return to pick him up. Emiliano had implored the acquaintance not to send him home with his mother because he was afraid of her and her boyfriend. Emiliano had a number of bruises and other signs of physical injury, some of which he reported had been inflicted by his mother or her friend Marcus. Later, he was found to have experienced sexual as well as physical abuse. He had a history of profound mental illness, for which he had been receiving treatment until Maria had "fail[ed] to follow through with treatment sessions." He also had many special needs—including those stemming from developmental delays, a cognitive disorder, motor incoordination, severe night terrors, and frequent mood changes—that required consistent, intensive care.

¶4 The Arizona Department of Economic Security (ADES) filed a dependency petition on April 9, 2007, and an amended petition in May. Emiliano was adjudicated dependent when Maria failed to attend a scheduled settlement conference on May 15, 2007. He was placed first in a foster family, where he lived from April 2007 until September 2008, and was later moved to a therapeutic foster home. By the time the termination hearing began, Emiliano had been in foster care pursuant to court order for more than two years.

¶5 Beginning in July 2007, Maria was offered a wide array of therapeutic services intended to facilitate Emiliano's return to her custody. Although she

participated in many of the offered services, completed a number of the tasks assigned her, and was at one point in substantial compliance with her case plan, she ultimately failed to benefit from those services. She made no demonstrable, consistent, or lasting progress in her ability to parent or even in her readiness to participate in therapeutic visitations with Emiliano. According to the case manager's report prepared for the permanency hearing in January 2009, four different individuals who had provided therapeutic services to Maria unanimously agreed that she remained unable to parent Emiliano safely.[2]

¶6 The juvenile court granted the motion to terminate Maria's parental rights in a detailed minute entry setting out its factual findings and legal conclusions. We have reviewed the record and found substantial evidence to support the court's factual findings. *See Denise R.*, 221 Ariz. 92, ¶ 4, 210 P.3d at 1264-65 (factual findings upheld if supported by reasonable evidence). The court's factual findings, in turn, support its legal conclusion that severing Maria's rights was warranted. We therefore adopt the court's findings of fact, approve its conclusions of law, and will not restate or belabor its comprehensive written ruling here. *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz.

[2]Such an outcome was consistent with the conclusions drawn by Dr. Jill Plevell, who had evaluated Maria in August 2007 and diagnosed her as suffering from cognitive, psychotic, and personality disorders that caused "a significant degree of maladjustment" in every area of her life. Plevell testified that at least two other psychologists had agreed with the personality-disorder diagnosis. Further, she testified personality disorders are very hard to treat and interfere with a person's ability to benefit from therapeutic services, requiring years of "very intensive intervention . . . to stabilize the disorder." As a result, she had thought it unlikely Maria would be able to benefit from reunification services but nonetheless recommended them "so that she could at least try."

278, ¶ 16, 53 P.3d 203, 207-08 (App. 2002), *citing State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶7 To the extent the issue may not have been sufficiently explored in the juvenile court's minute entry, we will address Maria's central, overarching complaint that she was wrongly denied the opportunity to have supervised therapeutic visitation with Emiliano. She contends such visitation was recommended both by Dr. Sergio Martinez, who performed a neuropsychological evaluation of Maria in April 2008, and by her treating therapist, Leonard Banes. By not following those recommendations and permitting her visitation with Emiliano, Maria argues, ADES failed to furnish adequate and appropriate reunification services as recommended by its own experts. As a result, she asserts, ADES breached both its statutory and constitutional obligations to provide her with necessary services before terminating her rights. *See* § 8-533(B)(8), (D); *Mary Ellen C. v. Ariz. Dep't of Econ. Sec.*, 193 Ariz. 185, ¶ 32, 971 P.2d 1046, 1052-53 (App. 1999).

¶8 As Maria correctly observes, a parent should not be denied visitation except "under extraordinary circumstances." *In re Maricopa County Juv. Action No. JD-5312*, 178 Ariz. 372, 375, 873 P.2d 710, 713 (App. 1994). But visitation in this case was not formally denied, terminated, or permanently foreclosed. Rather, after a three-day hearing on visitation between November 2007 and February 2008, the juvenile court granted ADES "discretion to provide therapeutic visitation" between Maria and Emiliano "upon a recommendation by [Emiliano's therapist,] Mr. McFarland." The simple fact is that

Maria was never granted supervised therapeutic visitation with Emiliano because his therapist could never recommend it.

¶9 From the outset, ADES had urged that Maria be permitted supervised visitation with Emiliano "only after a therapeutic recommendation [from] a mental health professional." The chief reason for imposing that condition was the fact that Emiliano had expressed fear of his mother and her boyfriend. In July 2007, three months after his removal and placement in foster care, when the subject of visiting his mother was broached, Emiliano "appeared very fearful" and said he "d[id] not really want to see" his mother. In September, when he mistakenly believed the case manager was taking him to see Maria after school, Emiliano "got really teary-eyed . . . , refused to get out of the car," and said: "Please don't make me see my mom."

¶10 The juvenile court's formal ruling on Maria's request for visitation in February 2008, following an evidentiary hearing on the issue, preserved the requirement of prior therapeutic approval; the court vested ADES with "discretion to provide therapeutic visitation with [Maria] upon a recommendation from [Emiliano's therapist,] Mr. McFarland." Maria did not seek review of that ruling nor ask the court to reconsider it. Nor did she participate consistently and appropriately with Emiliano's therapists—first McFarland, then his successor, Kay Diederich—in order to demonstrate to their satisfaction that visitation with Emiliano could safely occur. As the case manager wrote in a March 2008 report to the court for the first scheduled permanency hearing:

> The school reported an increase in aggressive and dangerous behavior the week after Emiliano spoke with this worker about visiting his mother. Since it was not clarified to him

> when that could start, he became anxious and had a number of incidents at school on a daily basis. After talking with him again to let him know his therapist and the court had to decide when it was safe for him to visit and [that] would not happen quickly, he stopped having such severe behavior problems at school.

The case manager further reported that Maria had failed to keep all of her scheduled appointments with McFarland in February and March 2008 and that McFarland needed "more contact with the mother before he is able to make a recommendation concerning visits."

¶11 When McFarland became a supervisor in the agency that employed him, he transferred Emiliano's case to Kay Diederich. Diederich became Emiliano's therapist from late May 2008 until late April 2009, during which time she saw him weekly, unless one of them was sick. Diederich testified she had first met Maria at a child and family team meeting in June or July of 2008 and had given Maria a business card with instructions to call her. Like McFarland, Diederich wanted to see Maria to determine whether it was appropriate for her to visit Emiliano.

¶12 Maria did not call Diederich until October 2008 and did not keep the first appointment they scheduled. They ultimately met only twice, once in October 2008 and again in December of that year. Although Diederich told Maria in December to contact her to schedule further sessions, they had only one subsequent contact, when Maria called claiming she was on her way to an appointment that actually had not been scheduled. She did not arrive for the supposed appointment and, after December 2008, did not contact Diederich again.

¶13 Diederich also testified that, although Emiliano did not ask her about his mother in their sessions, Diederich would sometimes ask him. She testified that he referred to his mother as Maria and that "his main memory" of her was that she had once thrown a shoe at him. Further, Diederich testified she had never recommended Emiliano have contact with his mother, both because the inconsistency of Maria's contacts with Diederich suggested she was not "engaged," and because Maria's behaviors had led Diederich to conclude Maria was not emotionally stable.

¶14 Because the juvenile court had ordered that visitation between Maria and Emiliano occur only with the approval of Emiliano's therapist and such a recommendation was never made, we reject Maria's contention that ADES wrongfully denied her necessary reunification services by not permitting her to have supervised therapeutic visitation with Emiliano. Regardless of what Maria's therapists and evaluators might have recommended for her, the juvenile court's first responsibility was to ensure Emiliano's safety and protect his best interests. *See* A.R.S. § 8-843(A) ("At any dependency hearing, the court's primary consideration shall be the protection of a child from abuse or neglect."); A.R.S. § 8-845(B) (in determining dependency disposition, "health and safety of the child" are "paramount concern"); *Antonio P. v. Ariz. Dep't of Econ. Sec.*, 218 Ariz. 402, ¶ 8, 187 P.3d 1115, 1117 (App. 2008) ("[T]he court's primary consideration in dependency cases is the best interest of the child."); *Willie G. v. Ariz. Dep't of Econ. Sec.*, 211 Ariz. 231, ¶ 21, 119 P.3d 1034, 1038 (App. 2005) (same). The court discharged that duty here by honoring the opinions of Emiliano's therapists, and the record reveals more than ample evidence to support those opinions.

¶15 The record contains abundant evidence supporting the termination of Maria's rights to Emiliano on each of the statutory grounds alleged and likewise supports the juvenile court's best-interests finding. We therefore affirm its order of September 10, 2009, terminating Maria's parental rights to Emiliano.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge